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March 4, 2013

via electronic filing

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: **Notice of *Ex Parte* Presentation**
Closed Captioning of Internet Protocol-Delivered Video Programming,
MB Docket No. 11-154
Accessible Emergency Information, and Apparatus Requirements for
Emergency Information and Video Description, MB Docket No. 12-107
Closed Captioning of Video Programming,
CG Docket Nos. 05-231 and 06-181 and ET Docket No. 99-254
TDI, et al. Petition for Rulemaking, PRM11CG
TDI, et al. Petition for Rulemaking, RM-11065
AT&T and NTCA Petitions Regarding the TDM-to-IP Transition,
GN Docket No. 12-353

Dear Ms. Dortch:

On February 28, 2013, Jim House of Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Andrew Phillips of the National Association of the Deaf (NAD), and Blake Reid, Diana Cohn, Dashiell Milliman-Jarvis, and Margarita Varona of the Institute of Public Representation at Georgetown Law, collectively, "Consumer Groups," met with Dave Grimaldi, Chief of Staff and Media Legal Advisor to Commissioner Clyburn, and Louis Peraertz, Legal Advisor to Commissioner Clyburn, to discuss matters related to the above-referenced dockets.

The Consumer Groups urged the Commission to recognize that the Twenty-First Century Communications and Video Accessibility Act ("CVAA") requires that the Commission's rules ensure that emergency information be accessible to people who are both blind or visually impaired *and* deaf or hard of hearing.¹ Indeed, the fact that a person who is blind or visually impaired is *also* deaf or hard of hearing does not make that person any less blind or visually impaired, nor does the CVAA permit the

¹ See Reply Comments of TDI, et al., MB Docket No. 12-107, at 2-4 (Jan. 7, 2013), <http://apps.fcc.gov/ecfs/document/view?id=7022100040> ("TDI Reply Comments").

Commission to ignore the needs of the deaf-blind community in promulgating the emergency information rules.² To the extent the Commission believes the record in the emergency information proceeding is insufficient to promulgate specific rules addressing that requirement, we suggested that the Commission should solicit further public comment in a further notice of proposed rulemaking or notice of inquiry.

We also urged the Commission to clarify that the emergency information rules will apply to all video programming providers (“VPPs”) and video programming distributors (“VPDs”) subject to Section 79.1 of the Commission’s rules.³ The CVAA specifically requires that the emergency information rules apply to all VPPs and VPDs under Rule 79.1, and not just broadcasters and multichannel video programming distributors (“MVPDs”).⁴ Accordingly, the Commission should mirror the specific language of Section 202(a) of the CVAA in the emergency information rules. The CVAA also prevents the Commission from excluding classes of apparatuses, such as those that receive Internet Protocol (“IP”)-delivered content from MVPDs, from the scope of the emergency information rules.⁵

The Consumer Groups reiterated our agreement with the Commission’s determination in the *IP Captioning Order* that removable media players are apparatuses subject to Section 79.103 of the Commission’s rules. The Commission should reject the Petition for Reconsideration of the Consumer Electronics Association (“CEA”) of that determination (“*CEA PFR*”) for the following reasons:⁶

- Removable media players are increasingly integrated with IP-delivered video services such as Netflix, Hulu Plus, and Amazon.⁷ These players must include closed captioning capability for those services to comply with the Commission’s IP captioning and apparatus rules. Exempting the removable media portion of those players from the Commission’s captioning rules would undoubtedly lead to consumer confusion and contravene common sense and obvious congressional intent.

² See *id.* at 2-3.

³ See *id.* at 5-8.

⁴ See *id.*

⁵ See *id.* at 8-16.

⁶ See *Closed Captioning of Internet Protocol-Delivered Video Programming*, Report and Order, 27 FCC Rcd. 787, 845-46, ¶¶ 99-100 (2012) (“*IP Captioning Order*”); Petition for Reconsideration of CEA, MB Docket No. 11-154, at 8-18 (Apr. 30, 2012) (“*CEA PFR*”), <http://apps.fcc.gov/ecfs/document/view?id=7021914799>; Opposition to *CEA PFR* of TDI, et al. MB Docket No. 11-154, at 11-20 (June 7, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021922030>.

⁷ E.g., CNET, *Panasonic DMP-BDT220 Review* (Apr. 13, 2012) (“The Panasonic DMP-BDT220 has . . . the Viera Connect suite of streaming-media services, which includes Netflix, Hulu Plus, Amazon Instant, . . . and Vudu.”), http://reviews.cnet.com/blu-ray-players/panasonic-dmp-bdt220/4505-9991_7-35120314.html

- Most removable media players now output video via High-Definition Multimedia Interface (“HDMI”), which does not permit captioning pass-through, and thus preclude consumers from rendering captions on removable media on their televisions.⁸ Thus, removable media players must be capable of rendering captions.
- Subtitles for the Deaf and Hard of Hearing (SDH) are an inadequate substitute for closed captions because they do not allow for user controls or, in most cases, persistent captions.⁹
- IP-delivered programming is not a substitute for programming delivered through removable media. A significant proportion of content delivered via removable media players is not subject to the IP captioning rules because it was never exhibited on television, and most programming delivered through fixed media is not available via IP delivery. For example, Netflix makes available approximately 100,000 DVDs and Blu-ray discs to its subscribers, but only about 12,000 streaming movies and television programs. Similarly, Amazon offers more than 25,000 Blu-ray and 500,000 DVD movie titles for sale, but only about 1,800 movies for IP streaming delivery.
- Captioning capability is required by the CVAA, so manufacturer concerns about the cost of including caption rendering technology in fixed media devices cannot be dispositive. Nevertheless, we believe that the costs to manufacturers of including caption rendering functionality in fixed media players would be minimal or nonexistent, and that consumer electronics manufacturers have failed to offer anything beyond vague and conclusory assertions to the contrary.¹⁰
- Panasonic’s contention that device manufacturers face increasing competition from online streaming services is not only irrelevant, but unsupported by the data provided in its recent *ex parte* filing, which presents only year-to-year shifts in shipment volume and omits other measures such as market share.¹¹
- The CEA report cited by Panasonic, apparently available to CEA members at a discount, costs \$2,000 (plus tax) for members of the general public.¹² In

⁸ See *IP Captioning Order*, 27 FCC Rcd. at 854-57, ¶¶ 115-19.

⁹ See *id.* at 846, ¶ 100.

¹⁰ See Notice of *Ex Parte* of TDI, et al. MB Docket No. 11-154, at 3 (Feb. 15, 2013), <http://apps.fcc.gov/ecfs/document/view?id=7022122102>.

¹¹ See Notice of *Ex Parte* of Panasonic, MB Docket No. 11-154, at 1-2, (Feb. 15, 2013), <http://apps.fcc.gov/ecfs/document/view?id=7022122031>.

¹² See *id.*; CEA, *U.S. Consumer Electronics Sales and Forecasts January 2013* (last visited Mar. 4, 2013), http://store.ce.org/US-Consumer-Electronics-Sales-and-Forecasts-January-2013_p_478.html.

2011, the Commission voiced significant concern over the inability of members of the public to access, view, and comment on materials that form the basis of Commission decisions and even proposed to “requir[e] parties to submit full copies of any materials cited in their pleadings or *ex parte* submissions.”¹³ While the Commission has not yet imposed such a requirement, selective and self-serving citations to documents that are effectively unavailable to the public should never form the basis for critical policy decisions, and we urge the Commission to disregard Panasonic’s cited figures, at least until Panasonic or CEA makes the cited report freely available for analysis and comment by the public.

Pursuant to our reply comments in the Commission’s video description and emergency information proceeding, the Commission should conclude, consistent with the *IP Captioning Order*, that fixed media players are apparatuses subject to 47 U.S.C. § 303(u)(1), and to reject CEA’s argument that Section 303(u)(1) should be interpreted inconsistently in the emergency information proceeding.¹⁴ If the Commission seeks to exclude playback-only fixed media players from the scope of the emergency information and video description rules, it must do so pursuant to some other method, such as its general waiver authority. Additionally, the Commission should reject CEA’s proposal to exclude apparatuses not “intended” by their manufacturers to play back video programming from the scope of Section 303(u)(1), and to set a compliance deadline based on the date of device sale, or to require labeling for noncompliant products.¹⁵

Separately, we discussed Consumer Groups’ continuing concern over outstanding television captioning issues, including those raised in Petitions for Rulemaking filed in 2004 and 2011.¹⁶ In particular, we strongly recommended that the Commission promptly issue an order permitting electronic filing of petitions for exemption and from the Commission’s closed captioning rules and comments and oppositions.

At present, the Commission prevents petitioners and commenters from utilizing electronic filing, instead scanning in mailed and hand-delivered filings for posting to

¹³ *Comment Sought on Benefits and Burdens of Requiring Commenters to File Cited Materials in Rulemaking Proceedings as Further Reform to Enhance Record-Based Decisionmaking*, GC Docket No. 10-44, 26 FCC Rcd. 16,166, 16,166-68 (Nov. 29, 2011).

¹⁴ See *TDI Reply Comments* at 14-16.

¹⁵ See Comments of CEA, MB Docket No. 12-107, at 6-7 (Dec. 18, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7022086421>; *TDI Reply Comments*, at 16-18.

¹⁶ Petition for Rulemaking of TDI, et al. RM-11065, CG Docket No. 05-231, ET Docket No. 99-254 (July 23, 2004), <http://apps.fcc.gov/ecfs/comment/view?id=5511440137>; Petition for Rulemaking of TDI, et al. PRM11CG (Jan. 27, 2011), <http://apps.fcc.gov/ecfs/comment/view?id=6016167106>.

the Electronic Comment Filing System (“ECFS”).¹⁷ The Commission first considered the issue of electronic filing generally in 1997, but did not address electronic filing in non-rulemaking proceedings such as the adjudication of closed captioning exemption petitions.¹⁸ The Commission initially “encourage[d] parties filing [exemption] petitions . . . to include a disk containing the text of their petitions along with the paper copy so that we can place the petition on our Internet site,” but did not permit electronic filing.¹⁹ In 2005, nearly eight years later, the Commission solicited comment on the electronic filing of petitions, but took no action.²⁰ In 2010, the Commission sought to “refresh the record” on the electronic filing of petitions, but again took no action.²¹ In 2011, the Commission “f[ou]nd it in the public interest to require the use of electronic filing wherever technically feasible,” noting that “[c]ommenters [we]re broadly supportive of [a] proposal to expand the use of electronic filing.”²² In the 2012 *IP Captioning Order*, the Commission required electronic filing for petitions for exemption from the IP captioning rules and comments and oppositions, “find[ing] that an electronic filing requirement would be most consistent with the Commission’s stated goals of efficiency and modernization and would streamline the petition process for all parties,” but again did not address electronic filing of the very same documents in the context of the television captioning rules.²³

The bar on electronic filing for caption exemption petitions, comments, and oppositions imposes unnecessary logistical burdens and inefficiencies on petitioners, commenters, and the Commission alike, leading to unnecessary and time-consuming printing and filing requirements, lost, mislabeled, and miscategorized documents, and other avoidable problems. There is no sensible reason to maintain this anachronistic state of affairs, and we urge the Commission to act promptly to permit electronic filing of documents pertaining to exemptions from the Commission’s closed captioning rules.

¹⁷ E.g., *Request for Comment: Request for Exemption from Commission’s Closed Captioning Rules*, CG Docket No. 06-181, 27 FCC 14,921, 14,922 (“Electronic filing is not available at this time.”).

¹⁸ See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, 12 FCC Rcd. 5150, 5154, ¶ 10 (Apr. 7, 1997).

¹⁹ See *Closed Captioning and Video Description of Video Programming*, MM Docket No. 95-176, 13 FCC Rcd. 3272, 3365, ¶ 203 (Aug. 22, 1997).

²⁰ See *Closed Captioning of Video Programming; TDI Petition for Rulemaking*, CG Docket No. 05-231, 20 FCC Rcd. 13,211, 13,228, ¶ 53 (July 21, 2005).

²¹ See *Consumer and Governmental Affairs Bureau Seeks to Refresh the Record on Notices of Proposed Rulemaking Regarding Closed Captioning Rules*, CG Docket No. 05-231, 25 FCC Rcd. 15,056, 15,057-58 (Oct. 25, 2010).

²² *Amendment of Certain of the Commission’s Rules*, GC Docket 10-44, 26 FCC Rcd. 1594, 1599, ¶ 14 (Feb. 4, 2011).

²³ See *IP Captioning Order*, 27 FCC Rcd. at 828, ¶ 66.

Finally, we discussed the petitions of AT&T and the National Telecommunications Cooperative Association (“NTCA”) regarding the TDM-to-IP transition.²⁴ As the Consumer Groups and other groups representing the deaf and hard of hearing community noted in our comments and reply comments regarding those petitions, we support the Commission’s efforts to facilitate a smooth transition to IP-based networks, but urge the Commission to ensure that the critical guarantees of accessibility to TDM-based networks for consumers who are deaf or hard of hearing are preserved.²⁵

Please don’t hesitate to contact me if you have any questions.

Respectfully submitted,

/s/

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²⁴ AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353 (Nov. 7, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7022086087>; NTCA Petition for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution, GN Docket No. 12-353 (Nov. 19, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7022086108>.

²⁵ Comments of TDI, et al., GN Docket No. 12-353 (Jan. 28, 2013), <http://apps.fcc.gov/ecfs/document/view?id=7022113635>; Reply Comments of TDI, et al. GN Docket No. 12-353 (Feb. 25, 2013), <http://apps.fcc.gov/ecfs/document/view?id=7022124930>.